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U.S. Reasons for Mining Challenged

By John M. Goshko
and Charles Babcock
Washington Post Staff Writers

The Reagan administration has told Congress that U.S. complicity in the mining of Nicaraguan waters is a justifiable use of collective self-defense sanctioned by the United Nations Charter and by U.S. international treaty commitments to aid Western Hemisphere nations that come under outside attack.

However, a number of international law experts charged yesterday that the administration's position is based on erroneous or selective application of the U.N. Charter and other treaty provisions, ignores the legal precedents set by past incidents of naval warfare and maritime disputes and is contrary to U.S. government legal positions dating back to 1837.

The administration has not acknowledged publicly the CIA's role in the mining of Nicaraguan harbors by insurgents fighting that country's leftist Sandinista government. But a legal opinion prepared by the State Department and presented privately to Congress on March 28 said, "naval mines can be a legitimate means of self-defense and have long been accepted as such by the international community."

The opinion cites Article 51 of the U.N. Charter, the 1947 Rio Treaty of Reciprocal Assistance and the Organization of American States Charter as authorizing the use of force "in self-defense against armed attack, whether that attack takes the form of open military operations or covert assistance to insurgent forces, and the state which is the victim of such attack may seek and receive armed assistance from friendly third states . . . ."

The administration contends that Nicaragua is aiding leftist guerrillas fighting the U.S.-backed government in El Salvador and has acted aggressively against Honduras and Costa Rica. As a result, administration officials have argued to Congress, the United States is justified in helping these countries to force Nicaragua to halt its aggression.

The opinion defends use of naval mines if they are employed according to "various international rules" aimed at minimizing injury to civilians and risk to third-country ships. The administration contends that the mines used against Nicaragua meet these restrictions because they are weapons of harassment rather than powerful charges capable of sinking ships or killing people.

However, the arguments in the State Department's opinion were disputed yesterday by several experts attending the annual meeting here of the American Society of International Law. In particular, they charged that administration attempts to base its case on the U.N. and OAS charters and the Rio Treaty do not meet those agreements' requirements.

Several noted that Article 51 of the U.N. Charter states, "Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council . . . ." The U.S. government, the critics noted, not only has failed to report the mining to the Security Council but also has refused to make any public admission that the mining took place.

Similarly, a number of the experts pointed out that under the collective security provisions of the Rio Treaty and the OAS Charter, an OAS member state must make a formal complaint that it is being attacked and permit the OAS to examine immediately those steps being taken by other states to give it aid.

"El Salvador should be complaining about being attacked to these organizations," said Alfred P. Rubin, professor of international law at the Fletcher School of Law and Diplomacy of Tufts University. Yet, he said, neither El Salvador nor the United States has moved in the OAS or the U.N. to formally charge Nicaragua with aggression.

Covey T. Oliver, a University of Pennsylvania law professor and former assistant secretary of state, joined Rubin in charging that the United States "lacks standing" to make a self-defense argument and intervene in a localized dispute so distant from U.S. borders.

"It seems to be a very wide stretch to assume that frontier adventurism between Nicaragua and Honduras and El Salvador rises to an explicit threat to the United States," Oliver said. Rubin added: "Not anyone can defend whoever he likes. That could set off a world war anytime small nations have disputes."

They and others also asserted that a resort to mine warfare is regarded in world maritime commerce as what Oliver called "a very serious business and usually is done only after a declaration of war . . ." and is disproportionate in its potential consequences to any threats to U.S. security.

Rubin, who worked for the Defense Department during the Vietnam war, recalled that in 1965 the United States decided not to mine Haiphong harbor in North Vietnam on the grounds that "injury to neutral vessels would be legally insupportable." He acknowledged, however, that in 1972 President Richard M. Nixon reversed that decision.

Rubin also asserted that mining is regarded as a proper action under the law of war only in the context of a blockade where official notice is given to all nations of potential danger to their ships.

The experts agreed that countries seeking to establish blockades have almost universally observed the notice requirement in the two world wars, through the U.S. quarantine of Cuba in the 1962 missile crisis, to Britain's establishment of a "no-entry zone" in the South Atlantic during the Falkland Islands conflict.

Several experts recalled that the current U.S. action runs directly counter to the position regarded as a precedent in U.S. law since 1837, when British forces, seeking to quell a rebellion in Canada, crossed the border to seize and burn an American ship that Britain believed was aiding the Canadian insurgents.

In a letter to the British government, Daniel Webster, then secretary of state, said that the United States could not accept the preemptive British incursion into U.S. waters and territory as a justifiable use of force even if Britain had grounds for its suspicions.

The principle enunciated by Webster is directly analogous to the complaints now being made against the United States, the experts said.